Nos. 82-1326 and 82-1327

IN THE

Supreme Court of the United States

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JAMES G. WATT, Secretary of the Interior, *et al.*,
Petitioners,

vs.

STATE OF CALIFORNIA, *et al.*,
Respondents.

WESTERN OIL AND GAS ASSOCIATION, *et al.*,
Petitioners,

vs.

STATE OF CALIFORNIA, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RESPONDENTS.

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Question Presented.

Whether the lower courts properly determined that the "directly affecting the coastal zone" test of § 307(c)(1) of the Coastal Zone Management Act is met whenever a federal agency initiates a series of events of coastal management consequence, when that determination is supported by the purposes and legislative history of that provision, and whether, using that test, the lower courts properly determined that Outer Continental Shelf Lease Sale 53 is a federal activity directly affecting the California coastal zone.

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BRIEF FOR RESPONDENTS.

STATEMENT OF THE CASE.

The dispute in this case, over the meaning of the phrase "directly affecting the coastal zone", the threshold test of § 307(c)(1),[1] and whether it requires a consistency determination for the Department of Interior's ("DOI") offshore pre-leasing and leasing decisions, originated as a disagreement within the federal government. The National Oceanic and Atmospheric Administration ("NOAA"), the agency within the Department of Commerce which is responsible for administering the Coastal Zone Management Act ("CZMA"), repeatedly asserted that the threshold test of

[1] 16 U.S.C. § 1456(c)(1).

§ 307(c)(1) should be liberally construed, and that DOI's Outer Continental Shelf ("OCS") leasing decisions required a consistency determination under that section.[2] DOI Pet. at 55a; 44 Fed. Reg. 37146, 37147 (1979). The Department of Interior, on the other hand, desired a restrictive definition of the threshold test, and sought an exemption for its OCS leasing activities.[3]

The dispute was submitted to the Department of Justice in 1979. The Department of Justice rejected DOI's argument that its leasing activities were exempt from § 307(c)(1), and agreed with the Department of Commerce that such activities were subject to consistency requirements.[4] Neverthe-

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[2]This Statement of the Case is abbreviated because the facts are fully set out in the District Court Opinion (DOI Pet. at 34a-40a), and in our Brief in Opposition to Petitions for Writ of Certiorari (pp. 1-8).

For the Court's convenience, we note at the outset several forms of citation that will be used throughout Respondent's Brief. The Outer Continental Shelf Lands Act Amendments of 1978 will be called "OCSLA." References to the opinions below are to those opinions as reproduced in the appendices to DOI's Petition for Writ of Certiorari, and will be cited as "DOI Pet. at . . . a." References to Petitioners' briefs will be "DOI Br. p. . . ." and "WOGA (Western Oil and Gas Association, *et al.*) Br. p. . . . ."

The brief of respondents County of Humboldt *et al.* will be referred to as "Local Gov't Br. at . . .". The brief of respondents Natural Resources Defense Council *et al.* will be referred to as "NRDC Br. at . . . ".

[3]Even prior to this specific dispute, there was disagreement over which agency should administer the CZMA. Although DOI actively sought CZMA administration, Congress gave it to the Department of Commerce and NOAA, based on that agency's superior expertise in coastal zone matters. See S. Rep. No. 92-526, 92nd Cong., 1st Sess. 42, 49 (1972).

[4]Letter, April 20, 1979, from Leon Ulman, Office of Legal Counsel, Department of Justice, to C. L. Haslam, General Counsel, Department of Commerce, and Leo M. Krulitz, Solicitor, Department of Interior (hereafter "DOJ Opinion"), J.A. 35, 36. The opinions of the Departments of Justice and Commerce notwithstanding, Interior refused to issue a consistency determination for the final notice of sale for Lease Sale 48 offshore Southern California. 44 Fed. Reg. 44590 (1979). California requested mediation by the Secretary of Commerce, as provided for in the CZMA, in order to resolve for future lease sales (particularly Sale 53) the question of the applicability of § 307(c)(1) at the leasing stage. See 16 U.S.C. § 1456(h); 15 C.F.R. 930 subpart (G).

less, DOI refused to prepare a consistency determination for Lease Sale 53. J.A. 66, 133. This refusal to conduct a consistency determination set the stage for the instant lawsuit, because California objected to the leasing of certain tracts on the basis of Interior's failure to comply with the CZMA's consistency requirements.[5]

California has always supported energy development where the benefits outweighed the risks. Although DOI's failure to issue a consistency determination invalidated the entire lease sale,[6] the state sought to limit its claims to only the most critical tracts in order to avoid impeding energy production. As a result, California sought an injunction on the basis of DOI's violation of the CZMA as to only 29 tracts in the sale.[7] These 29 tracts are extremely close to

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While the mediation was unsuccessful in producing any compromise, the mediator (the General Counsel of the Department of Commerce) concurred in California's view, calling the determination of the specific location in which to offer OCS leases "the key activity that creates a right to develop those leases," and noting that consistency review at the subsequent exploration and development stages "will address specific and individual exploration and development plans and will provide only a piecemeal review of the leasing activities." Memorandum, July 25, 1980 for the Secretary from, C. L. Haslam, General Counsel, Department of Commerce "Mediation of a Serious Disagreement between State of California and Department of Interior," attached to H.R. Rep. No. 96-1012, 96th Cong., 2d Sess. 82 *reprinted in* [1980] U.S. Code Cong. & Ad. News 7885, 7886 (hereafter referred to as "Mediator's Report"). He concluded that pre-lease activities are subject to the consistency provisions of § 307(c)(1). *Id.* at 82.

[5]California did not seek a premature determination of inconsistency but sought only an order directing DOI to fulfill its consistency obligations under § 307(c)(1), *i.e.*, that DOI must issue a consistency determination. 15 C.F.R. § 930.37.

[6]As originally envisioned by Interior Secretary Watt, Lease Sale 53 included the entire coast of Central and Northern California from Santa Barbara County to the Oregon border. DOI Pet. at 37a-38a. Secretary Watt subsequently divided the area into two lease sales, and Lease Sale 53 was limited to 111 tracts off the Central California coast. *Id.* A typical OCS tract is 5,760 acres. 43 U.S.C. 1337(b)(1).

[7]These tracts contain only about 8% of the oil reserves projected for the sale area according to Interior's subagency, the United States Geological Survey. Letter, May 1, 1981 to Governor Edmund Brown from James Watt, Secretary of the Interior, J.A. 144 (A.R. 461W).

(footnote continued on following page)

shore and are immediately adjacent to the coastal zone. Twenty-four of the tracts are within 12 miles of the coast, and all of the tracts range seaward from 3 to 24 miles offshore. DOI Pet. at 39a.

The District Court found that California had demonstrated a probability of success on the merits of this claim and preliminarily enjoined the challenged portion of the lease sale. On cross-motions for summary judgment, the District Court held that Lease Sale 53 directly affected the coastal zone and must be the subject of a consistency determination, and made permanent its injunction against the leasing of the disputed tracts.

On appeal, the Ninth Circuit affirmed the District Court's ruling on § 307(c)(1). The Court of Appeals followed much the same course of reasoning as the District Court, analyzing the purpose of the CZMA, its legislative history, and

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California also sought to enjoin leasing of the disputed CZMA tracts (plus three additional tracts) because of the Secretary of the Interior's rejection of the California governor's recommendations, under § 19 of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1345. The courts below ruled against respondents on this claim.

Despite the attempts of Interior and WOGA to portray the protection of the sea otter as California's sole concern with the disputed tracts, the State's concerns included the negative effects on many valuable biological resources, fisheries, ocean vessel traffic, port access, and coastal tourism and recreation. See, Letter, December 24, 1980, to Cecil Andrus, Secretary of the Interior, from Edmund G. Brown, Governor of the State of California, J.A. 89-95 (A.R. 224W).

Petitioners base this and other arguments on the Coastal Commission's Recommendation on Lease Sale 53 (J.A. 109). The main purpose of this document was to demonstrate that the Commission had serious concerns about the tracts at issue, and to show that a consistency determination was not academic.

DOI relies on this document to create the impression that California has already made the consistency determination. Fed. Br. pp. 46-47. However, as we will explain, it is DOI, not the state, that issues the consistency determination. The state then has the opportunity to disagree, and if so, the state and federal government are to try to resolve their differences. See Part IV, *infra*.

That process has never been followed in this case because of DOI's refusal to issue a consistency determination. Accordingly, all of WOGA's arguments concerning how the policies of the California Coastal Zone Management Program should or should not be applied (WOGA Br. pp. 8, 45) are simply not ripe for review, since those policies have never been applied by DOI in this case. See: Brief for the Cross-Petitioners pp. 10-22.

NOAA's longstanding position on the meaning of "directly affecting." It concluded that the lease sale was a federal activity directly affecting the coastal zone because "decisions made at the lease sale stage in this case establish the basic scope and charter for subsequent development and production." DOI Pet. at 13a.

The other courts that have reviewed this issue have also held that DOI's OCS leasing decision requires a consistency determination under § 307(c)(1) of the CZMA. *California v. Watt*, 17 E.R.C. 1711 (C.D. Cal. June 9, 1982); *Kean v. Watt*, No. 82-2420 (D.N.J. September 7, 1982), appeals pending No. 82-5679. As a result of the ruling in this case, DOI has now prepared consistency determinations for OCS lease sales for states throughout the country, including: Alaska, New Jersey, Massachusetts, Maine, New Hampshire, Rhode Island, Connecticut, New York, Maryland, Delaware, North Carolina, South Carolina, Florida, and, most recently, California.

SUMMARY OF ARGUMENT

Petitioners, DOI and WOGA, have sought to portray this as a case arising under the Outer Continental Shelf Lands Act. The majority of their briefing is devoted to the terms of that statute, and the authority OCSLA assigns to DOI. In their zeal to explore this topic, petitioners have largely overlooked the fact that this case arises under a different statute, § 307(c)(1) of the Coastal Zone Management Act. That section provides as follows:

> "Each Federal agency conducting or supporting activities *directly affecting the coastal zone* shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs." 16 U.S.C. § 1456(c)(1) (emphasis added).

At the outset, it is important to bear in mind that the CZMA establishes a system of federal-state coordination and cooperation for the long-term management and protection of the coastal zone. DOI's OCS activities are only one

narrow group of federal activities which must fulfill the requirements of this Act. To view this as an OCSLA case, as petitioners suggest, would result in a skewed definition of the phrase "directly affecting the coastal zone," as used in the CZMA, and would seriously frustrate Congressional intent to have federal agencies ensure that their activities which impact the coastal zone are consistent with a national scheme for coastal zone management.

The question before this Court is: what did Congress intend by the phrase "directly affecting the coastal zone," the threshold test of § 307(c)(1) of the CZMA, and how was this test intended to apply in the context of oil and gas activities on the OCS. As to the "directly affecting" language, petitioners would have this Court resolve the meaning of this phrase by relying solely on the "plain meaning rule." However, petitioners' reliance on this rule is misplaced because the definition they offer is one of their own making. Their requirement of "physical impacts" on the coastal zone "prior to further federal approval" is nowhere to be found in the dictionary they cite.

The lower courts properly rejected petitioners' approach and attempted instead to determine congressional intent based upon all of the traditional sources: the language of the Act, its purposes and policies, the legislative history, and the interpretation of the agency charged with administering the Act. After detailed review, the lower courts properly determined that Congress intended the threshold test was met whenever a federal agency initiates "a series of events of coastal management consequence." DOI Pet. at 15a, 50a. Petitioner's definition is inconsistent with congressional statements about the meaning of the "directly affecting" test, and frustrates the purposes of the CZMA.

As to the question of how § 307(c)(1) should apply in the context of OCS oil and gas activities, the lower courts correctly found that Congress intended that CZMA requirements would apply to DOI's OCS pre-leasing and leasing

activities. DOI Pet. at 12a-13a, 51a. These congressional statements appear not only in the legislative history of the CZMA, but also in the legislative history of OCSLA, the very statute upon which petitioners rely to exempt federal OCS activities. Congress made clear that both OCSLA and the CZMA were intended to apply to DOI's activities at the lease sale stage.

Nor will the implementation of this clear congressional intent amount to a state usurpation of activities under federal jurisdiction. It is the *federally-approved* coastal zone management *program* with which the federal agency activities must be consistent. Respondents seek only the rights Congress has granted the states in order to implement the national interest in preserving and protecting the coastal zone. As NOAA concluded in 1979, "[f]ailure to apply 307(c)(1) to Interior's OCS activities would constitute the *only* exemption to the federal consistency requirements of the CZMA, thus establishing a seriously harmful precedent for other federal activities. . . ." J.A. 61 (emphasis added)

ARGUMENT.

I.

CONGRESS INTENDED AN EXPANSIVE CONSTRUCTION OF THE PHRASE "DIRECTLY AFFECTING THE COASTAL ZONE," WHICH IS MET WHENEVER A FEDERAL AGENCY INITIATES A SERIES OF EVENTS OF COASTAL ZONE MANAGEMENT CONSEQUENCE.

As the lower courts properly concluded, effectuating congressional intent should be the primary concern of the court in construing the meaning of disputed language. DOI Pet. at 41a. To construe and interpret § 307(c)(1), the lower courts properly considered the language of the statute, its purposes, the legislative history and the interpretation of the agency charged with administering the Act. DOI Pet. at 13a-18a, 41a.

A. Only a Broad Construction of the "Directly Affecting" Threshold Test Can Fulfill Congressional Purposes in Adopting the CZMA.

Effectuating the purpose of a statute is critical to the interpretation of disputed language. *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975). The CZMA had its roots in the congressional determination, after several years of study, that legislation was necessary to protect, preserve and restore the nation's coastal zone. H.R. Rep. No. 92-1049, 92nd Cong., 2d Sess. 9-11 (1972). Congress determined that the coastal zone is "the Nation's *most valuable* geographic asset." *Id.* at 9 (emphasis added).

However, the coastal zone was (and still is) threatened with rapid deterioration and irreparable damage based upon accelerating development, including the extraction of mineral resources and fossil fuels. H.R. Rep. No. 92-1049, *supra* at 1, 9; see also 16 U.S.C. §§ 1451(c),[8] (d), (e), (f), (g). As a result, Congress adopted the CZMA in order to "establish a national policy and develop a national program" for the long-term protection of valuable coastal zone resources.[9] H.R. Rep. No. 92-1049, *supra* at 1; S. Rep. No. 92-753, 92nd Cong., 2d Sess. 1 (1972); 16 U.S.C. §§ 1451(a), (b), (d), (e), 1452(1), (2).

In construing § 307(c)(1), it is essential to bear in mind that in order to protect the coastal zone, Congress selected a particular system of federal-state coordination and cooperative planning. See, *e.g.*, S.Rep. No. 94-277, 94th Cong., 1st Sess. 3 (1975). Thus, while the national coastal zone management program was to be developed by individual states, it was to be approved by the federal government, and it was to be administered through federal-state coordination. See, *e.g.*, 16 U.S.C. §§ 1451(i), 1452(2), (4);

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[8]The reference in § 1451(c) to extraction of mineral resources and fossil fuels was apparently intended to include a reference to OCS development, as indicated by the 1980 addition of § 1451(f). (Coastal Zone Management Improvement Act of 1980, Pub. L. No. 96-464, 94 Stat. 2060).

[9]These coastal zone resources may include, for example, fisheries, beaches, estuaries, wetlands, etc. 16 U.S.C. § 1453(2).

1456(b), (c); 1455(c)(1), (8). Federal agencies engaged in programs "affecting the coastal zone" were encouraged to cooperate and participate in this scheme. 16 U.S.C. § 1452(4).

Because state participation in this federal scheme was voluntary, Congress established certain incentives for the states. One was the promise of financial assistance to states in developing these coastal zone management programs. However, the most important incentive was the promise that once the federal government had approved the management program, that program would not be violated by the activities and development projects of individual federal agencies.[10] §§ 307(c)(1), 307(c)(2).[11] This promise, as articulated in § 307(c), is at the heart of the inter-governmental coordination provisions of the CZMA. See, *e.g.*, H.R. Rep. No. 96-1012, *supra* n. 10, at 34.

This view of the statute was recently confirmed by virtue of Congressional amendments to the CZMA in 1980. In explaining its amendments to the policy section of the Act (16 U.S.C. § 1452), Congress stated:

> ". . . an *expansive interpretation of the threshold test* [of § 307(c)(1)] is compatible with the amendment to section 303 calling for Federal agencies and others to participate and cooperate in carrying out the purposes of the act." H.R. Rep. No. 96-1012, 96th Cong., 2d Sess. 35 (1980) (emphasis added).[12]

[10]DOI Pet. at 43a; see, *e.g.*, H.R. Rep. No. 96-1012, 96th Cong., 2d Sess. 35 (1980) (". . . broad opportunities for states to influence Federal activities enhances the incentive of the consistency provisions, thereby reinforcing voluntary state participation in the national program); see also H.R. Rep. No. 94-878, 94th Cong., 2d Sess. 53 (1976).

[11]In addition to § 307(c)(1), § 307(c)(2) mandates consistency for federal development projects within the coastal zone as follows: "Any Federal agency which shall undertake any development project *in* the coastal zone of a state shall insure that the project is, to the maximum extent practicable, consistent with approved state management programs." 16 U.S.C. § 1456(c)(2) (emphasis added).

[12]Similarly, NOAA, the agency charged with administering the statute, has recognized that a determination that a federal activity directly affects the coastal zone has significant benefits. As a result, ". . . Federal agencies are encouraged to construe *liberally* the 'directly affecting' test in borderline cases *so as to favor inclusion of Federal activities* subject to consistency review." See 44 Fed. Reg. 37146, 37147 (1979) (emphasis added), see also J.A. 59-62.

In short, as the lower courts correctly concluded, the CZMA was intended to establish a national program for the long-term management and preservation of the coastal zone, and Congress chose to implement this program through a scheme of federal-state cooperation and coordination. Accordingly, the purposes of the statute would not be served by a narrow, restrictive construction of the "directly affecting" threshold test,[13] as DOI has proposed. To the contrary, such an approach to the statute would have the effect of eliminating federal-state coordination under the CZMA while at the same time immunizing federal programs from consistency review despite their adverse impacts on the coastal zone. See DOI Pet. at 45a. This approach would inevitably lead to further degradation of the coastal zone by the very agencies restricted by the statute, contrary to the result Congress sought to achieve.[14]

B. Congress Intended That the "Directly Affecting" Threshold Test Is Met When a Federal Agency Initiates a Series of Events of Coastal Management Consequence.

1. The Legislative History of the CZMA Contains Clear Guidance as to the Meaning of the Threshold Test.

In construing the phrase "directly affecting the coastal zone," it is important to bear in mind that this threshold test applies to a broad variety of federal agency activities and programs, and is not just limited to DOI's activities — let alone to DOI's OCS activities. Petitioners' narrow definition of the phrase (*i.e.*, that the federal activity must have a physical impact upon the coastal zone prior to further federal approvals) would not only thwart the purposes and

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[13]Although we will at times use a shorthand statement such as the "directly affecting" test, it is important to bear in mind that it is an entire phrase ("directly affecting the coastal zone") that must be construed.

[14]See, *e.g.*, S. Rep. No. 92-753, *supra*, at 19 (". . . the Committee deems it *essential* that Federal agencies administer their programs, including developmental projects, consistent with the state's coastal zone management program.") (emphasis added); see also S. Rep. No. 94-277, 94th Cong., 1st Sess. 36 (1975).

policies of the Act, but also is clearly at odds with congressional statements in the legislative history of the CZMA. The CZMA was adopted in 1972 and amended in 1976 and 1980.

The original House and Senate versions of § 307(c)(1) applied only to federal activities and development projects *in* the coastal zone. S. Rep. No. 92-753, 92nd Cong., 2d Sess. 54 (1972); H.R. Rep. No. 92-1049, 92d Cong., 2d Sess. 5 (1972). The Senate version of the Act made clear that federal lands were excluded from the definition of "coastal zone." S. Rep. No. 92-753, 92nd Cong., 2d Sess. 47 (1972).

However, in Conference, § 307(c)(1) was changed so that it was no longer restricted to federal activities within the coastal zone. Instead, federal activities outside the coastal zone would also be covered if they met the "directly affecting" threshold test.[15] The conferees agreed that:

> ". . . as to Federal agencies involved in any activities *directly affecting the state coastal zone* and any Federal participation in development projects *in the coastal zone*, the Federal agencies must make certain that their activities are to the maximum extent practicable consistent with approved state management plans." H.R. Conf. Rep. No. 92-1544, 92nd Cong., 2d Sess. 14 *reprinted in* [1972], U.S. Code Cong. & Ad. News 4822, 4824 (emphasis added).

At the same time, the conferees selected the definition of coastal zone that made clear that federal lands — including OCS lands — are outside the coastal zone. Nevertheless, "[a]s to the *use of such lands* [*i.e.* federal lands, including OCS lands] which would affect a state's coastal zone, the *provisions of section 307(c) would apply*."[16] H.R. Conf. Rep. No. 92-1544, *supra* at 12. This statement is more easily understood in light of earlier legislative history.

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[15]Section 307(c)(2) continued to apply only to federal development projects within the coastal zone. 16 U.S.C. § 1456(c)(2).

[16]Since § 307(c)(2) applies to federal development projects in the coastal zone, this statement was clearly a reference to § 307(c)(1).

In trying to understand the meaning of the "directly affecting" test, it is important to realize that Congress always expected federal lands to comply with consistency requirements when they had a "functional interrelationship" with the coastal zone. Indeed, this was the case even in early versions of the statute which applied consistency requirements only "in" the coastal zone. Congress indicated that it intended OCS lands and other

> "lands or waters under Federal jurisdiction and control, within or adjacent to the coastal and estuarine zone, where the administering Federal agency determines them to have a *functional interrelationship* from an economic, social or geographic standpoint with lands and waters within the coastal and estuarine zone, *should be administered consistent* with approved State management programs." See S. Rep. No. 92-526, 92nd Cong., 1st Sess. 20, 30 (1971) (emphasis added).

The Conference Report change to the "directly affecting the coastal zone" test made clear that these federal lands (including OCS lands) were covered by consistency under § 307(c)(1) even though such lands were outside the coastal zone.[17]

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[17]Incredibly, DOI asserts that the § 307(c)(1) change from "in the coastal zone" to "directly affecting the coastal zone" had a "limiting function", *i.e.*, to "identify those activities on federal lands *within* the confines of a state's coastal zone that would be subject to the consistency requirements of the Act while at the same time excluding other activities from such requirements." Fed. Br. p. 24 (emphasis added). This argument makes no sense for two reasons.

First, Congress' adoption of a definition clearly excluding federal lands from the "coastal zone" had already clarified this point. 16 U.S.C. § 1453(1). Thus, § 307(c)(2) as codified refers to federal development projects *in* the coastal zone without suffering from the ambiguity petitioners suggest. 16 U.S.C. § 1456(c)(2).

Second, this argument suggests that § 307(c)(1) addresses only federal activities on federal lands *within* the three mile limit. However, NOAA's regulations make clear that federal lands outside the coastal zone limits, including OCS lands, are encompassed by consistency requirements. 44 Fed. Reg. 37142, 37146 (1979). Similarly, the 1975

In 1976, Congress amended the CZMA further, but left § 307(c)(1) unchanged, and provided no additional insight as to the meaning of "directly affecting."[18] However, in 1980, Congress undertook a comprehensive evaluation of the CZMA. Despite oil company lobbying to alter § 307,[19] it decided to leave the consistency requirements intact. However, in light of the dispute that had arisen over the meaning of the § 307(c)(1) threshold test,[20] and because of industry requests for an amendment, both the House and the Senate discussed the meaning of the "directly affecting" test, and how it applies in the context of an OCS lease sale. H.R. Rep. No. 96-1012, *supra* at 34, 35; S. Rep. No. 96-783, 96th Cong., 2d Sess. 10-11 (1980).

The Committee reports pointed out that Congress had considered the phrase "directly affecting the coastal zone" during earlier Congressional deliberations, and found that this threshold test was met whenever a federal activity

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Senate Report makes clear that § 307(c)(1) includes ". . . activities *in or out* of the coastal zone which affect that area." S. Rep. No. 94-277, *supra* at 36-37 (emphasis added). DOI's argument was properly rejected by the lower courts, which concluded, like NOAA, that the change to "directly affecting" was an expansion, not a contraction. NOAA, "Issue Paper, Section 307(c)(1) — Defining the Term 'Directly Affecting' Found in Section 307(c)(1) of the Coastal Zone Management Act" (1981) at 5, Fed. Exh. L-1EE, C.R. 38. (Hereafter "NOAA Issue Paper").

Petitioners' argument does, however, make clear that they seek to read the "directly affecting" test out of the statute, and to rewrite § 307(c)(1) to again read "in the coastal zone."

[18]In 1976 Congress did amend another section, § 307(c)(3). This subsection applies to *applicants* for federal licenses and permits, but does not apply to the federal government. DOI has improperly relied on this change in a vain attempt to restrict its obligations under § 307(c)(1). See Part II, *infra*.

[19]See Testimony of Charles H. Barre on behalf of the American Petroleum Institute and Western Oil and Gas Association, in hearings before the Committee on Commerce, Science, and Transportation on S. 2622, to improve Coastal Zone Management and for other purposes (April 30, 1980) at 82, 85, 86.

[20]Congress was aware of the California-DOI dispute that went to mediation before NOAA in 1979. See Statement of the Case, *supra*. The Mediator's Report is cited in the 1980 legislative history and attached thereto. H.R. Rep. No. 96-1012, *supra* at 34, 82.

". . . had a *functional interrelationship* from an economic, geographic or social standpoint with a state coastal program's land or water use policies." H.R. Rep. No. 96-1012, *supra* at 34, (emphasis added). This is, of course, the same "functional interrelationship" test drawn from 1971, when Congress was drafting the Act.

The House Report indicated that this "functional interrelationship" test could be restated as follows:

> "Thus, when a Federal agency initiates a *series of events of coastal management consequence*, the intergovernmental coordination provisions of the Federal consistency requirements should apply." H.R. Rep. No. 96-1012, *supra* at 34; S. Rep. No. 96-783, *supra* at 11 (emphasis added).

Accordingly, it is important to recognize that the meaning of "directly affecting the coastal zone" advanced by California, and effectively adopted by the lower courts[21] (*i.e.*, the functional interrelationship test as recently restated by Congress) is taken straight from the Congressional history of the CZMA.[22]

2. The Lower Courts Properly Determined That the Legislative History of the 1980 CZMA Amendments Must Be Considered and Given Significant Weight.

The legislative history of the 1980 CZMA amendments was given substantial weight by the lower courts because it contains the latest expression of congressional intent as to the meaning of § 307(c)(1), including significant statements regarding the very issue before this Court, *i.e.*, what is the meaning of the phrase "directly affecting the coastal zone," and how should it be applied within the context of federal OCS leasing activities.[23] DOI Pet. at 15a-16a; 50a-51a.

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[21]DOI Pet. 12a-13a, 51a.

[22]On the other hand, the definition offered by DOI and WOGA has no basis in the legislative history, and would thwart the purposes and policies of the Act. (See Part I-C, *infra*.)

[23]The OCS portion of the 1980 legislative history is addressed, *infra*, in Part II.

Nevertheless, DOI and WOGA urge that the reports be disregarded as "subsequent legislative history." In effect, they are asking the Court to accept their view of the statute and to ignore express statements of congressional intent. Their position is without merit.

First, the 1980 legislative history simply restates the test found in legislative history which dates back to 1971. The 1971 Senate Report states that consistency requirements apply to waters under federal jurisdiction, although outside the coastal zone, if they have a "functional interrelationship from an economic, social or geographic standpoint with lands and waters within the coastal zone." S. Rep. No. 92-526, 92nd Cong., 1st Sess. 30 (1971).[24] Because of its awareness of the dispute over the meaning of § 307(c)(1),[25] Congress in 1980 simply reiterated this "functional interrelationship test," while also providing an alternative method of phrasing the same test, *i.e.*, set in motion a series of events of coastal management consequence. In so doing, Congress did not alter the threshold test of § 307(c)(1), but merely confirmed it. H.R. Rep. No. 96-1012, *supra*, at 39.[26]

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[24]It must be remembered that Interior's Solicitor conceded that this is the one piece of early legislative history that explains the intent of Congress concerning what federal activities should be subject to § 307(c)(1) consistency. See Oct. 10, 1979, Memorandum to the Secretary of the Interior from Solicitor, "Consistency of Outer Continental Shelf (OCS) Pre-lease Activities with Coastal Management Programs," at 4-5, Exh. L-BB, C.R. 38. The preamble to NOAA's regulations also recognizes that early legislative history applied the functional interrelationship test. 44 Fed. Reg. 37143 (1979)

[25]See H.R. Rep. No. 96-1012, *supra*, at 34, 82.

[26]As recently as 1981, NOAA pointed to this 1980 legislative history to demonstrate that Congress had restated its original intent regarding the "functional interrelationship" test, and had "further clarified the definition of 'directly affecting' by noting that the term was to be confined to instances where Federal agencies initiated a series of events which are linked to resource management consequences in the coastal zone." NOAA Issue Paper at 9.

NOAA also correctly pointed out that on the House floor Congressman Studds, Chairman of the Subcommittee on Oceanography and the principal architect of the 1980 amendments, emphasized that the House Report language was intended to clarify but not modify the meaning of the term "directly affecting." NOAA Issue Paper pp. 9-10. See also 126 Cong. Rec. H 10111-H 10112 (daily ed. September 30, 1980).

Second, in 1980 the House and Senate conducted a comprehensive examination of the CZMA. The 1980 amendments to the CZMA were entitled: "The Coastal Zone Management *Improvement* Act of 1980", Pub. L. No. 94-464, 94 Stat. 2060 (emphasis added). In specifying the purpose of the legislation, the House Report states:

> "The *primary purpose* of H.R. 6979 is *to reaffirm* the nation's commitment to the wise use and management of our coastal resources *through the coastal zone management program*.
>
> "In this, the Presidentially endorsed 'Year of the Coast,' the committee believes that the *reauthorization* and *strengthening* of the Coastal Zone Management Act of 1972 is both necessary and appropriate. . . .
>
> "The committee also believes that the amendments provided in H.R. 6979 will refocus the CZMA from the program development phase *to the implementation and enforcement phase* of state management efforts." H.R. Rep. No. 96-1012, *supra*, at 14-15; see also S. Rep. No. 96-783, *supra*, at 2-3 (emphasis added).

Pursuant to its oversight authority, the House Subcommittee on Oceanography of the Merchant Marine and Fisheries Committee expended a year's effort[27] in a comprehensive review to determine what changes were needed in the Act for the implementation phase,[28] and what sections, such as 307(c)(1), should remain unchanged. H.R. Rep. No. 96-1012, *supra*, at 30; see also S. Rep. No. 96-783, *supra*, at 2; 126 Cong. Rec. H10108 (daily ed. September 30, 1980).

Following this extensive analysis, the committees with Congressional oversight authority for the CZMA explained why § 307(c)(1) should *not* be amended or changed during

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[27]There were eleven hearings in the House alone. 126 Cong. Rec. H10108 (daily ed. Sept. 30, 1980).

[28]Obviously, there were no management programs in effect in 1972. As of 1980, nineteen states and territories had approved coastal management programs. S. Rep. No. 96-783, *supra*, at 2. Accordingly, in 1980 Congress focused its attention on the implementation of coastal management programs, as opposed to their development.

the implmentation phase despite oil company requests. Although many other sections of the Act were changed, the committees stressed the importance of continuing consistency requirements for federal activities which directly affect the coastal zone, specifically including DOI's OCS activities. The 1980 decision not to amend § 307(c)(1) was based on congressional understanding of what the "directly affecting" test meant, and how it applied to federal OCS activities, as these matters were explained in the 1980 legislative history. Only by giving weight to this legislative history can Congress' decision to leave this section of the Act untouched be understood.

Thus, the 1980 reports constitute the most recent legislative history for the CZMA, as it now stands. These reports should receive at least the same weight as given to the 1972 and 1976 reports.[29] This is especially the case because Con-

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[29]In claiming that the 1980 reports are the subsequent legislative history of committees, petitioners forget that they are relying in large measure on committee reports from 1976 and even 1978 (under a different statute, OCSLA), clearly subsequent to the enactment of the CZMA. Moreover, while the 1980 committee reports address the very section at issue here, § 307(c)(1) of the CZMA, the material cited by petitioners addresses either a different section of the CZMA or a different statute altogether.

Petitioners also argue that the 1980 committee reports were not voted upon by the entire Congress. DOI Br. p. 40. However, that is always the case with committee reports. As in the usual situation, it must be presumed that Congress had knowledge of the reports prepared by the committees with the expertise. The full Congress did vote on the 1980 amendments following committee oversight; if Congress were dissatisfied with § 307, there would presumably have been an attempt to amend it on the floor.

In any event, the debates indicate congressional awareness of the content of the 1980 committee report. 126 Cong. Rec. H10111-H10112 (daily ed. Sept. 30, 1980). Moreover, the Chairman of the House Subcommittee stressed, as had the committee reports, that nothing in the reports changed the meaning of "directly affecting." *Id.* Instead, the reports simply reflected Congress' longstanding understanding of the meaning of the term.

Thus, DOI's argument that these reports represent only the "personal view" of legislators (DOI Br. p. 40) is clearly incorrect. Moreover, petitioners have cited authority which is completely inapposite (for example where individual legislators inserted their views in the Congressional Record after passage of the act in question, or where the committee making the statement had no jurisdiction over the statute at issue). DOI Br. pp. 40-41.

gress in 1980 sought to focus the CZMA toward the implementation and enforcement of coastal zone management programs. The consistency requirements of § 307(c)(1) are obviously central to this implementation effort. In the absence of federal agency consistency, the ability of the coastal states to manage the coastal zone effectively and comprehensively would be completely undercut.

DOI and WOGA claim otherwise because Congress did not amend § 307 in 1980. Notwithstanding the absence of an amendment to the particular section of the act at issue, this Court has frequently relied on recent legislative history (including committee reports) because it demonstrated Congress' understanding that the issue before the Court had already been resolved. See, *e.g.*, *Andrus v. Shell Oil Co.*, 446 U.S. 657 (1980); *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 595-596 (1980); *Bell v. New Jersey*, ___ U.S. ___, 103 S.Ct. 2187, 2194 (1983). Similarly, in this case, the 1980 legislative history explains Congress' view that the "directly affecting" threshold test had always been equated with the 1971 "functional interrelationship" language, and that this language had always encompassed federal OCS leasing activities. Moreover, the Court has been specifically receptive to committee reports which, as in this case, are a product of congressional scrutiny of a statute pursuant to the committees' oversight function. *Administrator, Federal Aviation Admin. v. Robertson*, 422 U.S. 255, 266 (1975).

In addition, Congress did adopt amendments in 1980 which relate to the issue before this Court. For example, Congress amended the policy section of the act having to do with cooperation of federal agencies. Pub. L. No. 96-464, § 303, 94 Stat. 2060, *supra*. The committee explained this change in the very section of the legislative history which discusses federal consistency under § 307(c)(1). H.R. Rep. No. 96-1012, *supra*, at 35.[30] In this respect, the 1980

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[30]The language in the House amendment to § 303(3) was enacted. H.R. Rep. No. 96-1012, *supra*, at 2; 16 U.S.C. § 1452(3).

legislative history can be viewed as contemporaneous.[31]

Even assuming, however, that the 1980 reports constituted subsequent legislative history, they should still be given significant weight in the search for legislative intent because they are clearly relevant. *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. *supra*, at 596 (particularly when the precise intent of the enacting Congress is obscure); *Andrus v. Shell Oil Co.*, *supra*, 446 U.S. at 665-666, n. 8; *Bell v. New Jersey*, *supra*, 103 S.Ct. at 2194.

C. DOI's Interpretation of the Phrase "Directly Affecting the Coastal Zone" Is Not the "Plain Meaning" of the Phrase and Frustrates Congressional Intent.

As restated in DOI's brief, the "directly affecting the coastal zone" test is met only when the federal agency authorizes activities that ". . . prior to *further federal* approval and *review*, will have a *physical impact* upon [the coastal] zone." DOI Br. p. 21[32] (emphasis added). DOI contends that the lower courts erred in rejecting this definition because it represents the "plain meaning" of the words "directly affecting the coastal zone." DOI's argument must fail for several reasons.

The most obvious defect is that DOI's definition is not the "plain meaning" of the phrase at issue. Although DOI claims its definition represents the common understanding of the word "directly," this definition cannot be found in

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[31]Congress also adopted a 1980 finding which expressly included OCS activities among the activities which require coastal zone management. Pub. L. No. 96-964 § 302(f), *supra* n. 8. As discussed, *infra* p. 28, a good portion of the 1980 discussion of § 307(c)(1) was addressed to federal OCS activities. These remarks were also contemporaneous in light of the addition of this policy section.

[32]This is a slight rewording of the test as stated in Secretary Watt's April 28, 1981 letter rejecting California's request for a consistency determination as follows: a federal activity directly affects the coastal zone only when "changes to coastal resources or physical actions are possible without subsequent decisions or actions." J.A. 133. NOAA rejected this definition as "extremely narrow and restrictive." Mediator's Report, H.R. Rep. No. 96-1012, *supra* at 84; see also, NOAA Issue Paper at 8.

the dictionary upon which DOI purportedly relies.[33] Indeed, none of the dictionary definitions of the word "directly" require any sort of "physical impact," or the lack of subsequent approval and review.

The second obstacle petitioners face is that examination of the dictionary makes clear that there is no single meaning for the word "directly". The word "directly" has a variety of meanings which vary with the context.[34] The question

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[33]The District Court noted that *Webster's New International Dictionary* (unabridged 3d ed. 1971) provides six alternative definitions for the word "directly":

"1. a. without any intervening space or time; next in order; squarely, exactly;
b. in a straight line; without deviation of course, by the shortest way.
2. a. straight on; along a definite course of action without deflection or slackening;
b. purposefully or decidedly and straight to the mark; in a straightforward manner without hesitation, circumlocution, or equivocation; plainly and not by implication; in unmistakable terms; unqualifiedly;
c. without divergence from the source or the original;
d. simultaneously and exactly or equally.
3. in close relational proximity.
4. a. without any intervening agency or instrumentality of determining influence; without any intermediate step;
b. in the exact words of the original; verbatim.
5. a. in independent action without any sharing of authority or responsibility;
b. face-to-face, in person.
6. a. without a moment's delay; at once, immediately;
b. after a little, in a little while, shortly, presently." DOI Pet. at 58a-59a.

[34]Indeed, even if this case were to be decided based on Webster's definitions, respondents should prevail. For example, DOI can scarcely deny that the impacts of exploration and development activities are "next in order" or "in close relational proximity" to a federal OCS lease sale. As the trial court acknowledged, it ". . . would be unrealistic to declare that the goal of Lease Sale No. 53 is merely leasing tracts and not 'pumping oil.' " DOI Pet. at 77a.

Petitioners' favorite definition is based on the tort doctrine of "no intervening cause." As the District Court concluded, this doctrine was created to limit liability and has no relevance to a statute designed to foster intergovernmental coordination. DOI Pet. at 59a.

However, even this tort definition does not help petitioners. As the District Court observed, *Black's Law Dictionary* (5th ed. 1979) defines

here is the meaning of "directly" within the context of an entire phrase, "directly affecting the coastal zone", as used within the CZMA. That phrase is not defined in the statute, and can scarcely be characterized as clear and unambiguous, as the history of this dispute and NOAA's frustrated attempts to formulate a definition attest.[35]

In any event, the fatal flaw in petitioners' argument is that even if there were a "plain meaning" to the term at issue, it would not help them to avoid analysis of the legislative history which is so damaging to their position. While the starting point in every case involving construction of a statute is the language of the statute, the circumstances of enactment may persuade a court that Congress did not intend words of common meaning to have their literal effect. *Watt v. Alaska*, 451 U.S. 259, 265-266 (1981). When legislative history is available and relevant, the "plain meaning" rule

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an "intervening cause" as one which "turns aside the *natural sequence of events*, . . . produces a result which would not otherwise have been *reasonably anticipated* . . . and destroys the causal connection" between the act and the effect. DOI Pet. at 60a, n. 16. The development of the tracts leased is certainly reasonably anticipated by both the lessor and the lessee. DOI Pet. at 61a. Indeed, that is precisely the reason that billions of dollars change hands in the course of an OCS lease sale.

To say that the direct effects of a lease are the intended uses of the property leased can scarcely constitute a departure from the "plain meaning" of the phrase "directly affecting the coastal zone." In short, the intermediate approval required for exploration or development/production under an OCS lease cannot be considered an "intervening cause." As a result, DOI has been forced to narrow the tort and dictionary definitions even further by adding irrelevant requirements such as "physical impacts."

[35]In 1978, NOAA equated the term "directly affecting" with "capable of significantly affecting." 43 Fed. Reg. 10511 (1978). This approach was rejected by the Department of Justice, and was subsequently withdrawn by NOAA. 44 Fed. Reg. 37142 (1979). Contrary to the impression created by DOI (pp. 35-36), California has never relied on this rescinded definition, and the lower court specifically rejected it. DOI Pet. at 56a, fn. 13.

Following mediation between California and DOI on the "directly affecting" issue, the Secretary of Commerce determined that a new rule defining the term should be issued. However, NOAA deferred issuance of a new regulation pending completion of the Coastal Zone Improvement Act of 1980. NOAA 1981 Issue Paper at 9. In 1981, NOAA did issue a definition of "directly affecting," but has now withdrawn that definition as well. See DOI Pet. at 17a-18a.

cannot be invoked to prevent its use, however clear the words may appear on superficial examination. *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 9-10 (1976). The controlling consideration is congressional intent, not dictionary definitions. See *Cass v. United States*, 417 U.S. 72, 77 (1974).[36]

Petitioners attempt to hide behind the "plain meaning" rule precisely because the legislative history makes clear that Congress intended an utterly different definition than the one they suggest, and that the threshold test is met when the federal agency initiates a series of events of coastal zone consequence. DOI's definition has nothing to do with the test posed by Congress and finds no support whatsoever in the legislative history. Not surprisingly, DOI is unable to cite a single piece of legislative history which would support its strained definition.

To the contrary, DOI's test contradicts legislative history. Rather than restricting effects to *physical* alteration of the coastal zone, Congress expressed an interest in a broad range of economic, geographic, social, aesthetic, and recreational impacts. H.R. Rep. No. 96-1012, *supra* at 34; S. Rep. No.

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[36]While *Bowsher v. Merck and Co.*, ___ U.S. ___, 103 S.Ct. 1587 (1983), is cited by petitioners (DOI Br. p. 21, WOGA Br. p. 35), it really supports respondents' position. In that case, this Court sought to determine the meaning of a different phrase ("directly pertain to and involve transactions relating to the contract") in a different statute. *Id.* at 1592. Although the Court's analysis began with the words of the statute, as is standard practice, it quickly shifted to an analysis of the legislative history of the statute and the Congressional purpose (*Id.* at 1592-1596), the very kind of analysis petitioners seek to avoid in this case.

The legislative history in the *Bowsher* case demonstrated that as originally introduced, the particular phrase at issue permitted access to "pertinent records." The author of the amendment adding the word "directly" in that particular statute specifically stated that his purpose was to limit the effect of the statute. *Id.* at 1592. On the other hand, in our case, the original language of the statute limited consistency to federal activities *in* the coastal zone. The change to "directly affecting" expanded the statute by extending consistency to activities *outside* the coastal zone. The *Bowsher* case clearly illustrates the necessity of determining what Congress intended by using "directly" in the CZMA, especially when the term is not defined in the Act.

92-526, *supra* at 10-11; see also 16 U.S.C. § 1451; 15 C.F.R. 923.13(b).

Similarly the requirement of no further federal agency approvals has nothing to do with Congressional intent. As Congress specifically indicated with respect to OCS activities, it contemplated that DOI's leasing activities must fulfill consistency requirements (under 307(c)(1)) *in addition* to the oil company/lessee consistency requirements that would follow at the exploration and development stages. H.R. Rep. No. 96-1012, *supra* at 28; S. Rep. No. 96-783, *supra* at 10-11. Congress intended consistency requirements to apply at *each* of these stages. *Id.* Indeed, to hold otherwise would contradict NOAA's regulations, which require consistency determinations for *each phase* of a major federal project, notwithstanding the fact that each subsequent stage is also subject to federal agency approval. See 15 C.F.R. 930.31(b), 44 Fed. Reg. 37146 (1979).

Instead of the broad, expansive test Congress desired (see Part I-A, *supra*), DOI has selected a narrow, restrictive definition. Instead of favoring *inclusion* of federal activities, DOI's definition is intended to *exclude* federal activities. The result of this approach, if permitted by this Court, is that a broad range of federal activities and programs would completely escape compliance with the CZMA, the direct opposite of what Congress intended in enacting the statute.[37]

Of interest on this point is that after this litigation commenced, NOAA suddenly adopted Interior's definition. 46 Fed. Reg. 26658 (1981); 46 Fed. Reg. 35353 (1981). Shortly after NOAA finalized its rule, resolutions of disapproval were introduced in both the House and the Senate. Following a vote by the House Merchant Marine Committee to disapprove the regulation, NOAA rescinded it. 46 Fed. Reg. 50937 (1981); 47 Fed. Reg. 4231 (1982); 47 Fed. Reg.

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[37]It must be remembered that the threshold test of § 307(c)(1) is not limited to OCS activities. Rather, the definition of this phrase applies to *all* federal activities in or out of the coastal zone.

20110 (1982). NOAA stated that it withdrew the regulation because of negative Congressional reaction, including the reaction of the committees with oversight responsibilities with respect to the CZMA. 47 Fed. Reg. 4231 (1982).

We submit that this history demonstrates that NOAA, the agency charged with administering the CZMA, concluded that its regulation implementing Interior's definition of "directly affecting" is contrary to Congressional intent.[38] It would hardly be appropriate under these circumstances to revive DOI's definition by reliance on the "plain meaning" rule. Indeed, as the lower courts found, the legislative history cited by respondents is clearly a far more reliable guide to Congressional intent than is DOI's contrived definition, which has no support in the legislative history and frustrates the purposes of the Act.

II.

CONGRESS INTENDED THAT FEDERAL OCS PRE-LEASING AND LEASING DECISIONS ARE INCLUDED AMONG THE FEDERAL ACTIVITIES WHICH MUST COMPLY WITH CONSISTENCY REQUIREMENTS UNDER SECTION 307(c)(1) OF THE CZMA.

Having considered what Congress intended by the phrase "directly affecting the coastal zone", the threshold test of § 307(c)(1), we now turn to the second part of the critical inquiry in this case: how did Congress intend this "directly affecting" test to apply in the context of federal OCS pre-leasing and leasing decisions.[39] This discussion is necessary because DOI and WOGA devote substantial portions of their

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[38] After chastising respondents for relying on the 1980 Committee reports, it is indeed ironic that DOI relies on the *minority* views of the House Committee report concerning the 1981 resolution of disapproval. DOI Br. pp. 40-41. In any event, DOI misses the point. The point is simply that NOAA apparently determined the regulation was wrong.

Nor is there any question of a "legislative veto" here. NOAA had always treated the statutory disapproval procedure [16 U.S.C. § 1463a] as no more than a "report and wait" requirement. 46 Fed. Reg. 35253 (1981).

[39] The effect and significance of the federal decision to lease OCS tracts is explained more fully in Part III. The decision includes a determination of where OCS development will occur (tract selection) and under what conditions (lease stipulations).

briefs to an attempt to establish an exemption from § 307(c)(1) for federal OCS pre-leasing and leasing activities (particularly tract selection).[40] However, petitioners' position is curious because it is inconsistent with their representations below. The Ninth Circuit stated: ". . . it is *conceded* on appeal that this section (§ 307(c)(1)) *does apply at the lease sale stage*." DOI Pet. at 12a[41] (emphasis added).

Moreover, this attempt to exempt DOI's pre-leasing and lease sale activities has been rejected by both the Department of Justice and NOAA[42] (see J.A. 36, 44-45, 58-59), in addition to every court that has considered this issue. The

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[40]See, *e.g.*, WOGA Br. p. 16; Fed. Br. p. 21 ("*An OCS lease sale does not directly affect the coastal zone* because it does not authorize any activities that, prior to further federal approval and review, will have a physical impact upon that zone.") (emphasis added).

On exceedingly rare occasions, DOI has applied consistency to the presence of a lease stipulation which requires a physical alteration of the coastal zone. WOGA Br. p. 26 n. 19. However, it should be understood that under DOI's definition of "directly affecting", federal OCS tract selection is invariably exempt from consistency review. Mediator's Report, H.R. Rep. No. 96-1012, *supra* at 84. Likewise, the question of whether stipulations should be added to protect the coastal zone is excluded from consistency requirements under DOI's test.

[41]At the Ninth Circuit oral argument, counsel for DOI stated ". . . we are accused of saying this provisions [sic], (c)(1), is inapplicable to leasing. *We do not take that position.* (c)(1) *is applicable* . . ." January 15, 1982 transcript of Ninth Circuit argument p. 10, lines 10-20 (emphasis added).

[42]Up until the commencement of this litigation, NOAA had consistently taken the position that federal OCS leasing activities fall within the requirements of § 307(c)(1). NOAA's repeated pronouncements to this effect are reviewed in some detail by the trial court. DOI Pet. at 55a-58a; see also, Memorandum of Eldon Greenberg, General Counsel, NOAA J.A. 58-59; see also NRDC Brief. The only NOAA regulations currently in effect are the ones adopted in 1979. These regulations do subject federal OCS activities to the consistency requirements of § 307(c)(1) (15 C.F.R. § 930.33(e)), and point out that application of consistency requirements to DOI's preleasing activities will lead to minimization of adverse environmental impacts. 44 Fed. Reg. 37142 (1979).

Although petitioners seek to confuse NOAA's position on this OCS issue with its discarded "significance" definition of "directly affecting" (DOI Br. p. 37), examination of NOAA's regulations makes clear that these issues are completely distinct. Long after NOAA abandoned the "significance" test, it continued to hold that DOI's pre-leasing and leasing activities required consistency review under § 307(c)(1). DOI Pet. at 56a, 57a; see also 44 Fed. Reg. 37142 (1979).

important point is that however the "directly affecting" test is defined, Congress has made clear that § 307(c)(1) was intended to apply to DOI's OCS pre-leasing and leasing decisions.

Examination of the 1972 legislative history contains some interesting insights on the application of §307(c)(1) to the OCS process. Although Congress made clear its recognition that the federal government retains paramount authority over all of its own lands, including OCS lands, it made equally clear that when activities on these lands directly affect the coastal zone, the federal activities must meet consistency requirements.[43]

We have previously addressed the fact that the early versions of § 307(c)(1) applied only to activities *within* the coastal zone. See Part I, *supra*. However, even at that time Congress intended to apply consistency requirements to federal lands outside the coastal zone where those lands met the "functional interrelationship" test. S. Rep. No. 92-526, *supra* at 20, 30. This easy legislative history makes clear that consistency requirements under the "functional interrelationship" test were intended to include federal OCS lands. *Id.* at 20.

This point was also made in the 1972 Conference Report. The Report discussed Congress' adoption of the Senate version of the definition of coastal zone, specifying that federal lands, including OCS lands, are excluded from the definition of coastal zone," and federal interests therein are retained. However:

> "As to the *use of such lands* [i.e. federal lands, including OSC lands] which would affect a state's coastal zone, the provisions of section 307(c) would apply." H.R. Conf. Rep. No. 92-1544, *supra* at 12.

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[43]NOAA's regulations reiterate that the retention of federal jurisdiction over submerged lands (§ 307(e)) was not intended to eliminate the requirement that activities on such lands fulfill consistency requirements under § 307(c)(1). 44 Fed. Reg. 37146 (1979).

In 1976, Congress amended the Act, but made no changes to § 307(c)(1).[44] However, there are some references to the applicability of consistency requirements to the federal decision to lease. For example, the Senate Report expressed concern that:

> "[t]here is very little communication between *Federal agencies* and the affected coastal states prior to major energy resource development decisions, such as the *decision to lease large tracts of the OCS* for oil and gas. . . . *Full implementation of the Coastal Zone Management Act of 1972* . . . could go far to institute the broad objectives of Federal-State cooperative planning *envisioned by the framers of the act.*" S. Rep. No. 94-277, 94th Cong., 1st Sess. 3 (1975) (emphasis added).

Furthermore, Congress in describing the federal OCS leasing activity stated:

> ". . . it is difficult to imagine that the original intent of the Act was not to include such a major federal coastal action within the coverage of 'federal consistency.' " H.R. Rep. No. 94-878, *supra* at 52, 53; see also S. Rep. No. 94-277, *supra*, at 36-37 (as to federal OCS activities, ". . . *under the act as it presently exists*, as well as the S. 586 amendments, if the activity may affect the state coastal zone and it has an approved management plan, the consistency requirements do apply.") (emphasis added).

In 1976, Congress did change another section of the act, § 307(c)(3). That section applies to *applicants* for federal licenses and permits. Congress considered adding the word "lease" to the phrase "license or permit" in § 307(c)(3), and determined not to do so. Congress did, however, add subsection (B) which specifically addressed the consistency responsibilities of an OCS lessee and applicant (*i.e.*, the oil company applying for specific permits) at the exploration, development and production stages.

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[44]The 1976 legislative history is addressed in depth in the Brief of NRDC.

Petitioners improperly infer from this change an intent to exclude *federal* OCS activities from coverage under § 307(c)(1). However, they overlook the elementary fact that federal OCS activities (pre-leasing decisions and the lease sale itself) can *only* be covered by § 307(c)(1). Section 307(c)(3) is restricted to consistency requirements for the *applicant* for federal licenses and permits, in this case, the oil companies.[45]

DOI has always argued that the addition of § 307(c)(3)(B) constituted the exclusive method by which OCS activities must comply with consistency requirements.[46] However, in 1979 the Department of Commerce disputed DOI's view, and the dispute was submitted to the Justice Department.[47] The Justice Department, like the lower courts, held that DOI's interpretation of this 1976 legislative history required an impermissible repeal by implication. J.A. 42-43, DOI Pet. at 48a. As the 1976 Conference Report explains, the addition of subsection (B) was intended solely to expedite consistency review for the oil companies' activities *after* the federal OCS lease sale was held. See H.R. Conf. Rep. No. 94-1298, 94th Cong., 2d Sess. 30-31 (1976); 122 Cong. Rec. 21230 (1976); see also DOJ opinion, J.A. 43. It had no impact on the federal lease sale and pre-lease sale decisions: *i.e.*, the selection of tracts and lease stipulations. J.A. 43.

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[45]As NOAA has interpreted the Act, (c)(1) is a residual category or catch-all category covering federal actions which are neither development progress under (c)(2), nor the activities of applicants for federal licenses and permits under (c)(3). 44 Fed. Reg. 37146 (1979)

[46]It should be observed that DOI's argument that the addition of § 307(c)(3)(B) exempts OCS leasing from the purview of § 307(c)(1) is completely inconsistent with its admission that § 307(c)(1) does apply to the agency's OCS leasing activities.

[47]NOAA's position is explained in a 1979 memorandum by its general counsel. Memorandum of Eldon Greenberg, J.A. 50-54. As NOAA pointed out, "neither the Administration nor Congress considered the question of exempting the Interior Department from its OCS pre-lease sale consistency obligations under section 307(c)(1)." J.A. 53. Indeed, the Department of Interior Solicitor's office conceded as much. J.A. 54.

Congress recently confirmed this. In explaining the effect of the 1976 addition of § 307(c)(3)(B), the 1980 Senate Report explains:

> "The Department of Interior's activities which *preceded lease sales* were to *remain subject* to the requirements of section *307(c)(1)*." S. Rep. No. 96-783, *supra* at 11 (emphasis added).

Similarly, the House Report explained the 1976 addition of § 307(c)(3)(B) as follows:

> "This amendment removed the need to examine individual leases under the general license and permit consistency section. This change *did not alter Federal agency responsibility* to provide states with a consistency determination related to *OCS decisions which preceded issuance of leases*." H.R. Rep. No. 96-1012, *supra* at 26 (emphasis added).

The 1980 legislative history thus makes crystal-clear the fact that federal OCS pre-leasing and leasing decisions are covered by § 307(c)(1). The benefits of this system are explained as follows:

> "As a result, intergovernmental coordination for purposes of OCS development commences at the earliest practicable time in the opinion of the Committee, *as the Department of the Interior sets in motion a series of events* which have consequences in the coastal zone. Coordination must *continue* during the critical exploration, development and production stages.
>
> "The Committee sees no justification to depart from this view." S. Rep. No. 96-783, *supra* at 11 (emphasis added).

These statements are especially meaningful in light of Congress' addition in 1980 of a Congressional finding stressing the need to resolve conflicts caused by OCS and

other energy activities.[48] As will be set forth in more detail *infra*, these conflicts can only be resolved in a meaningful fashion (at the "earliest practicable time") if the federal government is not permitted to escape responsibility for its critical OCS actions.

Finally, the legislative history of the 1978 Amendments to OCSLA confirms this result. As will be explained in more detail *infra*, Part III-A, OCSLA's legislative history reiterates that OCS activities — including federal lease sales *and* subsequent approval of development and production plans — must comply with the CZMA. H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 153 n. 52 (1977).

In short, Congress has made clear its intent that the federal pre-leasing and lease sale decisions, *i.e.*, the decision of what tracts to lease and pursuant to what conditions (lease stipulations), falls within the consistency requirements of § 307(c)(1).[49]

III.

DOI CANNOT ESCAPE ITS CONSISTENCY OBLIGATIONS UNDER THE CZMA BECAUSE ANOTHER STATUTE, OCSLA, ADDRESSES OCS DEVELOPMENT.

Having failed to convince the lower courts that DOI's OCS activities were exempt from the CZMA based upon the statute under consideration, petitioners have been forced to turn elsewhere. As a result, they now point to another statute, OCSLA, in hopes of persuading this Court that the

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[48]In 1980, Congress amended § 302 (16 U.S.C. § 1451) by adding the following finding:

> "(f) New and expanding demands for food, energy, minerals, defense needs, recreation, waste disposal, transportation and industrial activities in the Great Lakes, territorial sea, and *Outer Continental Shelf* are placing stress on these areas and are creating the *need for resolution of serious conflicts* among important and competing uses and values *in coastal and ocean waters*." Pub.L. No. 96-464, *supra* n. 8 (emphasis added).

[49]Quite apart from the legislative history, effectuating the purposes of the Act requires this result. To hold otherwise would allow significant federal programs to completely escape consistency review, frustrating Congressional intent.

1978 Amendments to the OCS Lands Act somehow negated the requirements of the 1972 CZMA.[50] This argument was rejected by the Department of Justice and by NOAA, in addition to the lower courts. DOJ Opinion, J.A. 43-45; Memorandum, March 23, 1979, of Eldon Greenberg, J.A. 54-57. Not only is it an impermissible repeal by implication, but the argument is also flatly contradicted by explicit Congressional history of OCSLA demonstrating that both the statutes were intended to apply to DOI's OCS leasing activities. *Id.*

Petitioners also suggest that because OCSLA requires staged decision-making, DOI should be able to defer its obligations until the stage when it has maximum information. This would, of course, be the exploration and development/production stages, when the leases are owned by private companies. However, it is too late at that stage to determine whether *DOI* should have selected these tracts for development in the first place. The fact is that DOI has a good deal of information at the lease sale stage (including an environmental impact statement), and that this is the very information that enables DOI to make its pre-leasing and leasing decisions. By the same token, coastal management programs can also be taken into account in reaching these decisions. To do so would effectuate Congress' clear intent to have DOI comply with consistency requirements in making its broad decisions at the lease sale stage (*i.e.*, what parts of the OCS should be developed and under what generic conditions) and to also have the oil companies comply with consistency requirements at the discreet subsequent stages in making the *specific* decisions on how an individual tract should be developed (*i.e.* where individual wells should be located, what equipment should be used, etc.).

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[50]WOGA is quite candid in this respect, stating that it is OCSLA, not the statute at issue, which should be given "initial scrutiny" in determining the meaning of language in the CZMA. WOGA Br. p. 21. This approach is, of course, contrary to every accepted tenet of statutory construction. In any event, petitioners' argument concerning OCSLA is, once again, completely inconsistent with their admission that § 307(c)(1) applies to DOI's OCS leasing activities. See p. 25, *supra*.

A. OCSLA Was Never Intended to Nullify the Requirements of the CZMA.

Petitioners suggest that because OCSLA addresses the development of OCS resources, that statute contains the exclusive statutory obligations of the federal government vis a vis OCS activities. The flaw in this argument is that apart from OCSLA, a broad variety of federal statutes apply on the OCS including NEPA, the Endangered Species Act, the Marine Mammal Protection Act, and the CZMA.[51] Not only is petitioners' assertion belied by the CZMA (Part II, *supra*) it is also contradicted by OCSLA, the very statute upon which petitioners seek to rest their claim.

Congress made this point clear in enacting a savings clause as part of the 1978 OCSLA Amendments as follows:

> "Except as otherwise *expressly* provided in this Act, nothing in this Act shall be construed to modify, or repeal any provision in the Coastal Zone Management Act of 1972. . . ." 43 U.S.C. § 1866; H.R. Conf. Rep. No. 95-1474, 95th Cong., 2d Sess. 161 (1978) (emphasis added).

Moreover, § 19 of OCSLA is the section which specifically addresses states' rights at the lease sale stage under that statute. In enacting this section, Congress expressly stated that OCS activities at the *lease sale stage* must also comply with CZMA consistency requirements:

> "The committee is aware that *under the Coastal Zone Management Act* of 1972, as amended in 1976 (16 U.S.C. 1451 et seq.), *certain OCS activities including lease sales and* approval of development and production plans *must comply with 'consistency' requirements* as to coastal zone management plans approved by the Secretary of Commerce. Except for specific changes made by Title IV and V of the 1977 Amendments, nothing in this act is intended to amend, modify, or repeal any provision of the Coastal Zone Management

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[51]This point is addressed in more detail in the NRDC Brief. It should be noted that all of these statutes apply to DOI's lease sale activities.

> Act. Specifically, *nothing is intended to alter procedures under that Act for consistency* once a State has an approved Coastal Zone Management Plan."[52] H.R. Rep. No. 95-590, *supra*, at 153 n. 52 (emphasis added).

Congress could not have made its intentions more clear. Congress intended that *both* OCSLA and the CZMA would apply at the lease sale stage.[53] This was confirmed two years after the 1978 OCSLA Amendments when Congress reenacted the Coastal Zone Management Act, flatly stating that § 307(c)(1) was intended to cover DOI's leasing activities. S. Rep. No. 96-783, *supra* at 11; H.R. Rep. No. 96-1012, *supra* at 28. Rather than repeal by implication, there is Congressional reaffirmation that DOI's leasing activities must comply with § 307(c)(1).

Nevertheless, petitioners assert that state participation under OCSLA is exclusive and eliminates any state influence on OCS decisionmaking under the CZMA. DOI Br. p. 42; WOGA pp. 23, 31-32. This is nothing more than a restatement of their argument that OCSLA negates the CZMA;

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[52]This Report is entitled to particular weight because the final bill followed the House version.

[53]Petitioners imply that since OCSLA makes consistency obligations explicit at the exploration and development/production stages, its failure to make these consistency obligations explicit at the lease sale stage confirms the exemption they seek. However, the legislative history of § 19 clearly lays such claims to rest, by making clear that OCSLA required the application of consistency requirements to federal OCS lease sales *and* to the subsequent stages.

In making the consistency obligations of the oil companies explicit at the subsequent stages, the 1978 Amendments to OCSLA merely attempted to parallel the references in § 307(c)(3)(B) of the CZMA. This had no effect on the residual *federal* activities covered by § 307(c)(1).

Moreover, a variety of federal obligations pertain at the lease sale stage despite the fact that they are not mentioned in OCSLA, and even though they apply at subsequent stages. For example, although not required by OCSLA's express terms, DOI prepares an EIS under NEPA at the lease sale stage, even though it may also have to do so at subsequent stages (and the OCSLAA reference to the subsequent stages is explicit, 43 U.S.C. § 1351(e)). Similarly, when endangered species are affected by OCS activity, federal agencies prepare an Endangered Species Act biological opinion at the lease sale stage *and* at the subsequent stages, even though OCSLA does not address this requirement. *North Slope Borough v. Andrus*, 642 F.2d 589, 607-611 (D.C. Cir. 1980).

the fact is, that Congress intended the two statutes to complement one another.

As the trial court explained in some detail, both statutes may co-exist. DOI Pet. at 51a-55a. While OCSLAA primarily emphasizes development of the OCS, the CZMA is directed to environmental concerns, *i.e.* the long-term protection of the coastal zone. *Id.* The obligations and rights imposed by the two statutes differ but can be integrated.[54]

Section 19 of OCSLAA provides governors with the opportunity to make recommendations on the size, timing and location of a lease sale. It only applies, of course, where the governors do in fact make such recommendations. However, unless the governors' recommendations strike a reasonable balance between the national interest (as defined in OCSLA), and the local interest, they need not be accepted by the Secretary. 43 U.S.C. § 1345.

Unlike governors' recommendations under OCSLA, § 307(c)(1) of the CZMA applies in the first instance only to those states which actually have an approved coastal management program.[55] *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1379-1381 (2nd Cir. 1977). However, it is the federally approved *program* itself with which DOI's activities are to be consistent "to the maximum extent practicable." Thus federal agencies are required to consider

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[54]Indeed, Congress made clear that the two statutes are integrated in some way at *every* OCS stage. Although DOI need not comply with the consistency requirements of § 307(c)(1) during the earliest stage, formulation of a broad national leasing program, DOI is required to at least *consider* state coastal zone management programs in formulating the national leasing program. H.R. Conf. Rep. No. 95-1474, 95th Cong., 2d Sess. at 103 (1978). However, at the lease sale stage, DOI is required to *comply* with the consistency requirements of § 307(c)(1). H.R. Rep. No. 95-590, *supra* at 153, n. 52; 1980 CZMA history, H.R. Rep. No. 96-1012, *supra*. At the subsequent stages, the oil companies are required to comply with consistency requirements regarding the specific activities in their exploration and development/production plans. 43 U.S.C. §§ 1340(c)(2), 1351(d); 16 U.S.C. § 1456(c)(3)(B).

[55]Congress intended to provide coastal states with federally approved coastal management programs with special status. As NOAA concluded, "[s]ection 19 was conceived as an *additional* protection for states." Memorandum, March 23, 1979, of Eldon Greenberg, J.A. 56 (emphasis added).

coastal management programs "as *supplemental requirements* to be adhered to in addition to existing agency mandates." 15 C.F.R. 930.32(a) comments; 44 Fed. Reg. 37146 (1979)[56] (emphasis added). Whether DOI's leasing decisions are in fact consistent will depend on the provisions of each approved program.

Thus, there may be cases where the CZMA applies but the governor does not object to a lease sale under § 19 of OCSLA, or the Secretary properly rejects the governor's recommendation because it does not strike the statutory "reasonable balance." There will be other cases where the governor makes a balanced recommendation, but the state does not have a federally approved coastal management program. However, even when both statutes are applied to the same sale, they are not inconsistent. The governor's recommendation may address a variety of issues which are not part of that state's approved coastal management program, and vice versa.[57] As the lower courts ruled, each statute addresses different Congressional goals, both of which can be given expression.[58] See Brief of NRDC. As WOGA has conceded:

> "Recognition of the primacy of the Secretary's authority at the leasing stage implied by Section 19 *by no means entitles a Secretary of the Interior to proceed with OCS leasing in disregard of state CZMA programs*." WOGA Br. p. 26 (emphasis added).

We agree.

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[56]It should be noted that under OCSLA, § 19 only applies *if* a governor makes recommendations to DOI. Under the CZMA, state recommendations are not a prerequisite.

[57]For example, a governor's recommendations can address non-environmental issues such as bidding procedures, drainage issues (43 U.S.C. § 1337(g)), etc., while the coastal zone management program must be specifically addressed to protection of the coastal zone.

[58]Petitioners can hardly question this since § 19 of OCSLAA also gives the governor the authority to submit recommendations on a proposed development and production plan (43 U.S.C. § 1345) even though such plans must also comply with CZMA consistency requirements (43 U.S.C. § 1351(d)).

B. OCSLA's Staged Decisionmaking Does Not Permit DOI to Escape Its Consistency Obligations at the Lease Sale Stage Simply Because the Oil Companies Have Separate Obligations at Subsequent Stages.

Petitioners tried to persuade the lower courts that DOI's CZMA consistency obligations at the lease sale stage were excused by virtue of the separate CZMA obligations of the oil companies at the subsequent stages pursuant to § 307(c)(3)(B). 16 U.S.C. § 1356(c)(3)(B). When this argument proved unavailing under the CZMA, they attempted to resurrect it in a new form under OCSLA; this time they argued that since OCSLA provides for staged decisionmaking, their obligations at the lease sale stage can be deferred until the subsequent stages.

The lower courts properly rejected this argument because, as has already been discussed, the legislative history of both OCSLA and the CZMA makes clear that Congress intended consistency requirements to apply both to DOI's pre-leasing and leasing decisions *and* to the oil companies' specific activities at subsequent stages. In any event, the argument must fail because DOI's OCS activities can only be reviewed for consistency when its pre-leasing and leasing decisions are made — which is, of course, at the lease sale stage.

At the outset, it is important to make clear what transpires at the pre-lease and lease sale stage. This is the time when, based upon all of the information it has gathered (including an Environmental Impact Statement), DOI makes its critical decisions as to what portions of the coast will be offered for lease (tract selection), at what time, and pursuant to what protections (lease stipulations). Few federal decisions could have more dramatic impacts on the coastal zone.

DOI's decision is essentially a subdivision of the OCS, creating both a right to develop and the conditions under which development can take place.[59] As the Ninth Circuit

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[59]Industry will not buy all the tracts nor will they find petroleum on all the leases they do buy. Nevertheless, DOI's decision to offer certain tracts (and not to offer others) sets the basic parameters on where there can be an industry right to produce, develop, and transport petroleum.

concluded, DOI's choices:

> "determine, or at least influence, whether oil will be transported by pipeline or ship, which areas of the coastal zone will be exposed to dangers, the flow of vessel traffic, and the siting of on-shore construction." DOI Pet. at 13a; see also DOI Pet. at 45a, 62a-65a.

DOI's decision also defines where along the coast vessel collisions, well blowouts and other accidents may cause oil spills that can adversely affect coastal recreation areas, sea bird and marine mammal habitats, and other coastal zone resources — the very resources Congress sought to protect by enactment of the CZMA.

Accordingly, it is at the lease sale stage that the federal government itself deletes tracts because of environmental concerns, as Interior Secretary Andrus did for Lease Sale 48 offshore Southern California.[60] It is also at this stage that DOI imposes generic conditions on lessees that would protect coastal zone resources.[61]

While petitioners seek to portray an OCS lease sale as a mere transfer of paper, nothing could be further from the truth. An OCS lease is defined in OCSLA as a document which ". . . *authorizes exploration* for and *development and production* of minerals." 43 U.S.C. § 1331(c) (emphasis added). Although it is true that after receiving a lease the oil company must still obtain certain additional specific permits at the subsequent stages, the usual assumption is that once a federal OCS lease is issued, the lessee will be able to develop that tract. Indeed, the lessee is *required* to develop the tract within a set period of time or he will lose his rights. 43 U.S.C. § 1337(b)(2).

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[60]Letter, June 29, 1979, from Secretary Andrus to Governor Brown; see also Brief of Local Governments.

[61]See Memorandum, October 10, 1979, to Secretary from Solicitor, on "Consistency of Outer Continental Shelf (OCS) Pre-lease Activities with Coastal Zone Management Programs" at 8; Exh. L-11, C.R. 3; *Alaska v. Andrus*, 580 F.2d 465, 471 (D.C. Cir. 1978), vacated in part as moot, 439 U.S. 922.

Thus, for example at the exploration stage, the lessee requests approval of his *specific* exploration activities, such as a description of the equipment he plans to use, the location of an individual exploratory well to be drilled, etc. See 43 U.S.C. § 1334(3). Later the oil company obtains approval for a development and production plan, again addressing the specific facilities and operations which will be constructed or utilized. 43 U.S.C. § 1351(a). At this stage, the exploration and development/production plans are only required to focus on the specific activities that will occur on an individual tract. 39 C.F.R. §§ 250.34-1(a)(1), 250.34-2(a)(1). The question at these stages is not *whether* a particular tract should be developed, but *how* that particular tract should be developed.

By contrast, the time to determine *whether* a particular tract should be developed at all is at the lease sale stage. After the oil companies have spent billions of dollars to acquire property rights at a federal OCS lease sale,[62] it is a little late to be telling them, for example, that portions of the sale immediately adjacent to critical coastal zone resources should not be developed at this time, or that they should be developed only with certain protections (stipulations) for coastal zone resources.

In short, the time to consider *whether* development of an OCS tract can occur must be at the lease sale stage. The subsequent stages assume that this threshold decision has already been made, and the question at the later stages is *how* to develop the tract.[63]

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[62]As DOI pointed out, in Lease Sale 53 high bids totalling $2.038 billion were tendered. DOI Br. p. 47 n. 44. In fact, Chevron's bid for one tract alone was $333,600,000. *Los Angeles Times*, April 29, 1981, Part 1 at 1. It is ludicrous to argue, as petitioners have, that the oil companies expend these enormous sums of money at the lease sale stage for nothing more than the right to *apply* for permits at the later stages.

[63]Although petitioners seek to create the impression that federal OCS leases can be cancelled at will, the fact is that cancellation can occur only in exceedingly rare circumstances, and at major expense to the taxpayer. 43 U.S.C. § 1334. Furthermore, it was Congress' belief that disapproval of development and production plans "for environmental reasons would be *most unusual*." H.R. Rep. No. 95-590, *supra* at 169.

Furthermore, unless consistency requirements are applied at the lease sale stage, DOI's activity in the OCS process completely escapes consistency review. The federal OCS pre-leasing and leasing decisions can *only* be reviewed under § 307(c)(1). Acceptance of DOI's argument frustrates the purpose of the CZMA because federal programs directly affecting the coastal zone were intended to fulfill consistency requirements.

By contrast, at the exploration and development/production stages, the leases are in the hands of individual oil companies. At this point, any discussions about consistency must take place between the state and the holders of the leases of individual tracts; under normal circumstances, the federal government does not even participate in this process.[64] See 16 U.S.C. § 1346(c)(3)(B). As a result, consistency review is completely piecemeal, and there is no meaningful ability to address the cumulative effects of the sale as a whole on the coastal zone.[65]

Nevertheless, petitioners argue that it makes more sense to wait for later stages because more information is available at that time.[66] However, DOI itself makes decisions con-

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[64]The only exception is in the rare instance of an override of the state decision by the Department of Commerce. 16 U.S.C. § 1356(c)(3)(B). DOI, however, plays no part in this process.

[65]This point is addressed in more detail in the Brief of Local Governments. However, it can be illustrated by a history of the submission of oil company exploration and development plans for the Santa Barbara Channel between 1978 and mid-1981. See July 1, 1981 Affidavit of Mari Gottdiener, and Exhibits thereto. J.A. p. 152 *et seq.* At an OCS lease sale, individual oil companies acquire the rights to develop various tracts. Thereafter, these companies apply for consistency certification of their exploration and development plans at different times, and often for one tract at a time. For example, Chevron submitted the first plan in December 1978, followed by Exxon submittals in February and March 1979, Sun Production in May 1979, and so on for a total of twenty-seven separate submittals through June 1981. *Id.*

[66]The logical extension of this argument is that all OCS decisions would be deferred until the production stage, when information is maximized. WOGA implies as much, by suggesting that not even oil exploration (which, like oil development and production, can lead to oil spills) has much effect on the coastal zone. WOGA Br. p. 27, n. 21, p. 28. However, OCSLA does not permit such deferral. *State of California v. Watt*, 668 F.2d 1290, 1306 (D.C. Cir. 1981) (holding that DOI could not meet its obligations to properly plan the national five year OCS program in the context of a decision on the placement of a particular exploratory well). Neither does the CZMA.

cerning tract selection and lease stipulations at the lease sale stage on the basis of the best available information because this is the *only* time such decisions can be made.[67] By the same token, this is the only time when a determination can be made as to whether tract selection and lease stipulations are consistent with the coastal zone management program.[68] Although the continual collection and assimilation of pertinent information must continue throughout the OCS process, OCSLA itself requires that DOI at each stage base its decisions upon the best information available at that time. *State of California v. Watt, supra* n. 66, 668 F.2d at 1307.

The fact that OCSLA, like other federal statutory regimes, provides for staged decisionmaking does not allow DOI to escape its CZMA consistency obligations at any particular stage. To the contrary, NOAA's regulations require that where a federal agency engages in phased decisionmaking based upon developing information, a consistency determination is required for *each* major decision so that the agency can ensure that the project *continues* to be consistent. 15 C.F.R. § 930.37(c); 44 Fed. Reg. 37148 (1979). This is precisely what Congress said about the CZMA. S. Rep. No. 96-783, *supra* at 11.

Nor would the oil companies' consistency requirements at the subsequent stages be merely duplicative. The more specific information that is available at these subsequent stages will be needed to address the more specific issues that arise at these stages, *i.e.*, what specific equipment will be used, where platforms will be placed, etc. In short, the

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[67]Petitioners seek to minimize the extensive information available at the lease sale stage while at the same time emphasizing the years of study that precede DOI's lease sale decisions, commencing with the formulation of the National Five Year Leasing Program. They ignore the fact that an environmental impact statement is prepared at the lease sale stage which, along with supplemental information (see, *e.g.*, 43 U.S.C. § 1352), resource estimates, etc., provides DOI with information the agency believes is sufficient to make its leasing decisions.

[68]As the Department of Justice recognized in 1979 ". . . some of the pre-leasing activities of the Secretary will give rise to consistency problems which cannot be reviewed at all under the paragraph [307(c)(3)] (B) procedure, or for which such review comes too late." J.A. 43.

development of information under the stages of OCSLA is entirely appropriate to the decisions made at each stage, including the application of § 307(c)(1) at the lease sale stage.[69]

IV.
APPLICATION OF A CONGRESSIONAL SCHEME FOR COASTAL ZONE MANAGEMENT IS CONSISTENT WITH FEDERAL PARAMOUNTCY TO THE OCS.

Finally we must dispose of the issue that is at the bottom of all of petitioners' arguments. While Congress clearly desired to allocate the states certain limited rights in the OCS decisionmaking process, petitioners are dissatisfied with this congressional scheme. As a result, they attempt to alarm this Court by suggesting that the exercise of these states' rights is somehow contrary to the national interest and that it grants states an unintended "veto" which is inconsistent with paramount federal authority on the OCS. Petitioners are wrong on both counts.

Petitioners seek to create the impression that application of the CZMA at the lease sale stage will somehow benefit the states in derogation of the national interest. Indeed, they suggest that while there is a "national interest" in the "expedited development of vital resources on the outer continental shelf,"[70] there is only a "states' interest" in the

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[69]Petitioners cite a number of cases decided under statutes other than the CZMA — such as NEPA and the Endangered Species Act. Fed. Br. pp. 22, 28 n. 29; WOGA Br. pp. 34, 45. However, as the trial court explained, these statutes have a much narrower focus than the CZMA, which is intended to comprehensively manage the coastal zone for this and future generations. DOI Pet. at 77a. Ironically, however, one of the cases they cite demonstrates that the Endangered Species Act requires consultation *both* at the lease sale stage *and* at the subsequent stages. *North Slope Borough v. Andrus*, 642 F.2d 589, 607-611 (D.C. Cir. 1980) (" 'The earlier in the progress of a project a conflict . . . is recognized, the easier it is to design an alternative consistent with the requirements of the act, or to abandon the proposed action.' ").

In any event, petitioners conveniently ignore the fact that consideration of the statute at issue here — the CZMA — has come out against them in the courts which have considered the issue. *Kean v. Watt, supra; California v. Watt, supra*, 17 E.R.C. 1711.

[70]In so stating, petitioners overlook the fact that while OCSLA is primarily concerned with development of the OCS, the statute also makes clear Congressional intent to protect the environment. 43 U.S.C. §§ 1802(b)(7), 1332(5); 1332(4); 1802(4), (5), (6).

preservation, and protection of the coastal zone. Fed. Br. p. 19.

Congress would be indeed surprised to hear this. The entire purpose of the CZMA was to protect the "national interest" in preserving the coastal zone, which is a *national* treasure. 16 U.S.C. § 1451(a); H.R. Rep. No. 92-1049, *supra* at 9.

In essence, DOI seeks to unilaterally elevate the national interest in OCS development over the national interest in coastal zone protection. However, only Congress can make such a choice. To date, Congress has made clear its desire to advance *both* national interests. This can only be done if § 307(c)(1) is applied to DOI's leasing activities.

Nor is this inconsistent with federal paramountcy on the OCS. It must be remembered that it is by virtue of the very federal authority championed by petitioners that Congress has applied a variety of statutes on the OCS — including the CZMA.[71]

The CZMA itself is a carefully crafted scheme which spells out the very federal and states' rights that are at issue in this case. Federal-state cooperative planning and coordination are at the heart of the Act. S. Rep. No. 94-277, *supra*, at 3; 16 U.S.C. § 1457(c). See Part I-A, *supra*. As a result of this statutory scheme, states with federally approved coastal zone management programs are given a greater role in OCS decisionmaking than states without such programs. See *e.g.*, 16 U.S.C. § 1456(c)(3)(B); Memorandum, March 23, 1979, of Eldon Greenberg, J.A. 59. However, the entire statutory scheme has built-in federal controls

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[71]In addition, WOGA argues that to apply the CZMA on the OCS would undermine federal rights established by virtue of the "1953 Compromise." WOGA Br. pp. 17-21. While this issue is more fully addressed in NRDC's Brief, the point is simply that the 1953 Compromise has nothing to do with this case. The states are not trying to re-argue ownership issues, and no one disputes that the federal government has paramount authority on the OCS. The only question here is whether DOI will be required to recognize certain limited rights that *Congress* has granted the states. If anything, it is petitioners' argument that undermines federal authority by suggesting that Congress cannot give the states any authority in an area of federal jurisdiction.

and safeguards that prevent any arbitrary exercise of the state's consistency rights.

Federal agencies exercise significant power over the content of coastal zone management programs. While states initially develop such programs, they have no effect under the CZMA unless they meet national criteria and are approved by the federal government. 16 U.S.C. §§ 1455(c), 1456(c)(1). The Secretary of Commerce may not give the required approval "unless the views of federal agencies principally affected by such program have been adequately considered." 16 U.S.C. § 1456(b). DOI is among the federal agencies consulted during this process, and specifically was involved in the approval of California's Coastal Zone Management Program. California Coastal Management Program, Attachment J at 20; Exh. L-18; C.R. 3.

Moreover, Congress gave special attention to energy production, both on the OCS and elsewhere. Unless the Secretary of Commerce finds that a state program provides for adequate consideration of the national interest in energy production, he must disapprove it. 16 U.S.C. § 1455.[72]

In addition to the controls imposed during the development of the program, it must be remembered that after the program is approved, it is the *program itself* with which the federal activities must be consistent. NOAA's regulations make clear that under 307(c)(1) (and 307(c)(2)), it is the *federal agency* that makes the consistency determination. 15 C.F.R. § 930.34.[73] NOAA's regulations then provide

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[72]Indeed, California's program has been specifically reviewed on the question of whether it satisfied this requirement, and the Ninth Circuit ruled that it did. *American Petroleum Institute v. Knecht*, 609 F.2d 1306, 1315 (9th Cir. 1979). Furthermore, the Court found that the California Program and the CZMA contained adequate safeguards to protect against any arbitrary exercise of the state's consistency powers. *Id.*

[73]This does not mean that the federal agency can simply ignore the views of the state. NOAA's regulations demonstrate that the federal agency is expected to reach its determination through a process of coordination with the state, and both governments are encouraged to work out their differences. 15 C.F.R. §§ 930.39-930.44. As a preliminary matter, federal agencies are strongly encouraged to obtain the views and assistance of the state agency in formulating the determination. 44 Fed. Reg. 37148 (1979) (comment to 15 C.F.R. § 930.39(a)). On matters where the interpretation of the state's program is at issue, the state, as the body that developed the program, would likely be given substantial deference.

that the state has a right to disagree with the federal agency's consistency determination, stating the reasons for its disagreement and describing alternative measures which, if adopted, would allow the activity to proceed consistent with the program. 15 C.F.R. § 930.41-42.

If there is disagreement, the regulations contemplate negotiation and cooperative efforts between the parties to resolve their differences, either on their own or through mediation by the Secretary of Commerce.[74] 15 C.F.R. § 930.43-44. If the disagreement cannot be resolved, the federal agency has the ability to proceed.[75]

All of this is to be contrasted the Congressional scheme under § 307(c)(3), when the consistency of private industry is at issue. Under this section, if the state objects because the activity is inconsistent with the program, the activity simply cannot go forward.[76] 16 U.S.C. § 1456(c)(3).

It is thus clear that when Congress chose to give states the authority to unilaterally stop activities, it said so. At the same time, however, under § 307(c)(1), the federally approved coastal zone management program becomes a *substantive requirement of federal law* to be complied with along with all other applicable federal requirements. See 15 C.F.R. § 930.32 and comments thereto, 44 Fed. Reg. 37146 (1979). This is not a "veto," since it is the *program* with which the federal activities must be consistent. Rather, this is the application of a *federal scheme* for the protection of

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[74]Indeed, the mediation provisions of the CZMA were expanded in 1976 precisely because Congress foresaw that these kinds of federal-state disagreements could occur. H.R. Rep. No. 94-1298, 2d Sess. 52 (1976).

[75]The fact that the statute does not automatically preclude the federal agency from going forward with the activity does not necessarily mean that the agency is in compliance with the CZMA. As with other federal agency actions in violation of federal statutes, the state can bring suit if the agency's action should be stopped because it is inconsistent with the coastal zone management program.

[76]"*No license or permit shall be granted* by the Federal agency until the state or its designated agency has concurred with the applicant's [consistency] certification. . . ." 16 U.S.C. § 1456(c)(3)(B) (emphasis added). The state's objection can be overridden by the Department of Commerce in certain circumstances. 16 U.S.C. § 1456(c)(3).

our *national* coastal zone.[77]

Nor does petitioners' repeated reliance on OCSLA help their cause. Even OCSLA makes clear that while states were not intended to have a "veto" over federal OCS activities pursuant to OCSLA, they were intended to be given a "leading role" in federal OCS decisionmaking, notwithstanding federal paramountcy on the OCS. H.R. Conf. Rep. No. 95-1474, *supra* at 106; H.R. Rep. No. 95-590, *supra* at 52-53. Indeed, one of the primary purposes of the 1978 Amendments was to limit the DOI's discretion under the OCSLA with a corresponding increase of state participation in OCS decisionmaking. H.R. Rep. No. 95-590, *supra* at 50, 104-06, 152, 153.[78] As a result, OCSLA now permits governors to make lease sale recommendations which must be accepted by DOI when certain criteria are met. 43 U.S.C. § 1345.

In short, petitioners' spectre of hypothetical state abuse of § 307(c)(1) consistency requirements is completely un-

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[77]As NOAA has stated, even after federal approval, the program must continue to be responsive to federal requirements or approval may be withdrawn. J.A. 60; see also 6 U.S.C. § 1458(d). Moreover, Congress retained the ability to review and remedy any possible state abuse through an annual review of activities found to be inconsistent with approved programs. 16 U.S.C. § 1462(a)(6). Indeed, Congress during its recent oversight proceedings did review the states' consistency record, and found that they had not abused their authority:

> "A concern was raised at the hearing that § 307 may be used by the states to override Federal authority in OCS leasing activities. This had not been borne out by the record to date. It may be useful to note that state coastal zone management plans are approved under § 306, and are the direct result of, and must continue to be responsive to, a set of Federally mandated goals set out in the Coastal Zone Management Act in order for Federal consistency to continue to be applicable at the state level." S. Rep. No. 96-783, *supra*.

[78]OCSLA also permits state law to fill in the gaps in federal OCS law. 43 U.S.C. § 1333(2)(A).

As explained above, pp. 33-35, the states' rights under OCSLA are in addition to those derived from the CZMA, and apply under different conditions. As NOAA concluded in 1979, Congress intended additional benefits for states which expended the significant effort necessary to develop coastal programs addressing national concerns: "States with approved programs are provided with *both* mandatory CZMA consistency authority and discretionary OCS Lands Act (§ 19) gubernatorial recommendations. . . ." Memorandum, March 23, 1979, of Eldon Greenberg, J.A. 59.

founded. Their position in this case is nothing more than an attempt to exempt DOI's OCS activities from a federal statute which is applicable to all other federal agencies, and, indeed, even to all of DOI's other activities.[79] However, such an exemption would undermine the purpose and policies of the CZMA, and would flatly contradict Congressional intent to include DOI's pre-leasing and leasing activities within § 307(c)(1) requirements.

Nor would application of § 307(c)(1) unduly disrupt OCS activities. DOI is now preparing consistency determinations on all OCS lease sales throughout the United States with the sole exception of the tracts at issue in Lease Sale 53. NOAA has concluded that application of consistency requirements at the lease sale stage would actually reduce conflicts with affected states and avoid delay during the subsequent stages. 44 Fed. Reg. 37142 (1979). Indeed, to hold otherwise would undoubtedly *increase* litigation, because consistency issues would have to be resolved *one tract at a time* and one exploration or development/production plan at a time. See Memorandum, March 23, 1979, of Eldon Greenberg, J.A. 60-61.

In sum, the states are not seeking to interfere with the paramount authority of the federal government on federal

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[79]As NOAA explained in 1979:

"Failure to apply 307(c)(1) to Interior's OCS activities would constitute the *only* exemption to the federal consistency requirements of the CZMA, thus establishing a seriously harmful precedent for other federal activities significantly affecting the coastal zone. The exemption is particularly unreasonable in light of the fact that other Interior public land management activities which significantly affect the coastal zone (e.g., *onshore oil and gas, geothermal and coal development*) are subject to the federal consistency requirements. Allowing this adverse precedent to be set would encourage other federal agencies to claim implied exemptions whenever "state consultation" procedures are incorporated in legislation enacted subsequent to the 1972 CZMA. Accordingly, *an exemption for Interior could be the first step towards serious erosion of the consistency provisions, and consequent intergovernment conflicts.*" Memorandum, March 23, 1979, of Eldon Greenberg, J.A. 61 (emphasis added).

lands. Instead, we seek only the rights Congress has granted us in order to implement the national interest in preserving and protecting the coastal zone.

V.

LEASE SALE 53 "DIRECTLY AFFECTS THE COASTAL ZONE" OF CALIFORNIA WITHIN THE MEANING OF SECTION 307(c)(1).

The ultimate question in this case is whether, as the lower courts found, Lease Sale 53 "directly affects the coastal zone" within the meaning of § 307(c)(1). This of course turns entirely on the preceding discussion concerning the meaning of this threshold test and how Congress intended it to apply within the context of OCS leasing activities.

Congress clearly intended that § 307(c)(1) and its threshold test be interpreted broadly so that states would be provided with an incentive to develop and apply coastal management programs, and so that federal activities would not contribute to the degradation of the coastal zone. Only through the development and application of such programs would the goal of preserving our precious coastal zone resources be achieved. It was on this basis that Congress first suggested the "functional interrelationship test," as well as its alternative formulation that a federal activity directly affects the coastal zone when it initiates a series of events of coastal management consequence.

DOI and WOGA have argued for a restrictive definition of the threshold test which would effectively exclude DOI's OCS pre-lease and lease sale activities from § 307(c)(1), and for a blanket exemption of OCS pre-lease activities. However, as we have shown, the definition urged by DOI has no support in the legislative history of the CZMA and is not even supported by those authorities upon which DOI relies. Moreover, the legislative histories of both the CZMA and OCSLA, and the opinions of the Department of Justice and NOAA all demonstrate that OCS pre-lease and lease sale activities are not exempt from § 307(c)(1); DOI has previously conceded as much.

Thus, the definitions of "directly affecting the coastal zone" suggested by Congress, adopted by the lower courts,

and urged here by respondents must be employed to determine whether Lease Sale 53 "directly affects" the California coastal zone. Applying those definitions leaves little doubt that Lease Sale 53 initiates a series of events of coastal zone management consequence and has a "functional interrelationship" with the California coastal zone. DOI Pet. 12a-13a, 62a-65a.[80] As the Ninth Circuit ruled, Lease Sale 53 establishes the first link in a chain of events leading to oil and gas development. DOI Pet. at 13a. Application of consistency requirements to this lease sale is all the more important because the leasing of these tracts has enormous implications for the coatal zone development that accompanies OCS development: including resolution of such issues as the need for marine terminals and onshore processing facilities within the coastal zone.

The numerous "direct effects" of Lease Sale 53 were described at length by the District Court (DOI Pet. at 62a-65a) and will not be repeated here. It should be noted however that the "direct effects" are particularly significant on the facts of this case, where the OCS tracts at issue commence at the three-mile limit and are thus immediately adjacent to the very coastal zone resources Congress sought to protect by virtue of the CZMA.

Indeed, based on recent developments, DOI must concede as much. Lease Sale 73, which is scheduled for November 1983, is located off the Central California coast in the same area as the tracts at issue in this case. In fact, the Lease Sale 73 tracts being offered *surround* the Lease Sale 53 tracts at issue here. Because DOI has already prepared a

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[80]As previously discussed (p. 20, n. 34), even under petitioners' "intervening cause" test, it would be clear that Lease Sale 53 directly affects the coastal zone. As the District Court observed, DOI "reasonably anticipates" the coastal zone effects of OCS development when it issues the leases, and the federal approvals at subsequent stages cannot, by any stretch of the imagination, be found to "destroy the causal connection between the act [DOI's leasing] and the effect." DOI Pet. at 60a, n. 16

consistency determination for Lease Sale 73,[81] the agency has at last demonstrated beyond dispute what California has contended throughout this litigation: that is, if the correct definition of the "directly affecting" threshold test is applied, there can be no doubt that Lease Sale 53 requires a consistency determination.

CONCLUSION.

The Ninth Circuit judgment that Lease Sale 53 "directly affects" the coastal zone and requires a consistency determination should be upheld.

Respectfully submitted,

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[81] By letter of June 30, 1983, DOI transmitted to the California Coastal Commission a "Determination of Whether Outer Continental Shelf Lease 73 is Consistent to the Maximum Extent Practicable With the California Coastal Management Program." In this document, DOI analyzed whether the lease sale is consistent with some sixteen different policies of the California Coastal Zone Management Program. In its response, the state may indicate that additional policies are involved. WOGA's suggestion that consistency will turn on only one policy of the Program is a gross simplification. WOGA Br. p. 8.

It should also be noted that of the 29 tracts at issue here, 10 were not bid upon at Sale 53. (The District Court's injunction permitted bids to be received but not accepted.) DOI has included these 10 Lease Sale 53 tracts in its proposed Notice of Sale for Lease Sale 73 and has stated that it is considering leasing these tracts as part of Lease Sale 73. "Special Report by the Federal Defendants Concerning Status of These Cases," filed in *California v. Watt*, Nos. CV-81-2080, CV-81-2081 (C.D. Cal. July 26, 1983).